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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In the Matter of)
)
Reallocation of Television Channels) ET DOCKET NO. 97-157
60-69, the 746-806 MHZ Band)

TO: The Commission

COMMENTS OF JOVON BROADCASTING CORPORATION

Jovon Broadcasting Corporation ("Jovon"), by its counsel, respectfully submits the following comments in response to the above-referenced Notice of Proposed Rulemaking ("NPRM").

In the NPRM, the Commission proposes to reallocate the spectrum at television Channels 63, 64, 68, and 69 to public safety use. NPRM, ¶11. On June 13, 1997, Jovon filed a petition for reconsideration of the Commission's Sixth Report and Order (the "Sixth Order") on the implementation of digital television ("DTV") in which it requested the Commission to allot DTV Channel 64 to WJYS(TV) during the DTV transition period. As set forth in that petition, a copy of which is attached, the allotment of DTV Channel 64 to WJYS(TV) is crucial to fulfilling the fundamental goals of the Sixth Order in the unique circumstances involving this station.

In the NPRM (at ¶21), the Commission has stated that allotments in DTV Channels 60-69 which result from petitions for reconsideration of the Sixth Order will be "fully protected" during the

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DTV transition period. By these comments, Jovon stresses the importance of that commitment to permit achievement of the public interest benefits that will result from the allotment of DTV Channel 64 to WJYS(TV). Accordingly, Jovon respectfully requests the Commission to adhere to the proposal to afford full protection to DTV allotments in Channels 60-69, and not to adopt any rules that would prevent the allotment of DTV Channel 64 to WJYS(TV).

Respectfully submitted,

JOVON BROADCASTING CORPORATION

By: Debra A. McGuire
Howard A. Topel
Debra A. McGuire

Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.--Suite 600
Washington, D.C. 20036
(202) 939-7900

Its Counsel

September 15, 1997

ATTACHMENT

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of

Advanced Television Systems And Their
Impact Upon The Existing Television Service

)
)
)
)

MM Docket No. 87-268

TO: The Commission

RECEIVED
JUN 13 1997
Federal Communications Commission
Office of Secretary

**PETITION OF JOVON BROADCASTING CORPORATION
FOR RECONSIDERATION**

Jovon Broadcasting Corporation ("Jovon"), licensee of WJYS(TV), Hammond, Indiana, by its counsel, hereby petitions for reconsideration of the action in the Sixth Report and Order in the above-referenced proceeding (the "Sixth Order") allotting DTV Channel 36 to WJYS.

When a nationwide scheme of general applicability is developed, aberrations inevitably will occur. The allotment of DTV Channel 36 to WJYS is such an aberration but, fortunately, is one that can easily be cured. If not so cured, however, the allotment calls into question the fundamental propriety of the entire scheme that has been adopted.

I. Preliminary Statement

In adopting a DTV table of allotments, the Commission sought to follow the guidepost

"that it is important to adopt an approach that provides for a high degree of service replication by all stations, while at the same time ensuring that all stations are able to provide DTV service competitively within their respective markets." Sixth Order at ¶ 30 (emphasis added).

The Commission also sought to follow the guidepost that, in implementing DTV,

“it is important to continue to foster our longstanding broadcast policy goals of diversity and encouraging new entry, particularly by minorities and women. We also believe that fostering these goals is consistent with our spectrum management responsibilities to ensure that the DTV spectrum is used efficiently.” *Id.* at ¶ 95.

The Commission also adopted a Final Regulatory Flexibility Analysis with respect to the DTV allotments endeavoring to comply with its statutory obligation “to minimize the significant economic impact on small entities” of its action. *Id.* at Appendix D; 5 U.S.C. §604(a)(5). And, the Commission attempted “to minimize the impact of our DTV allotment and spectrum recovery proposals on low power TV operations.” Sixth Order at ¶ 114.

Whatever the case may be elsewhere, the allotment of Channel 36 to WJYS badly misses the Commission’s guideposts and directly defeats its goals. WJYS (NTSC Ch. 62) is located in the Chicago, Illinois, DMA. It is one of 12 commercial for-profit television stations which compete in that market.¹ All 11 of WJYS’ competitors will operate from the Sears and Hancock Buildings antenna farm in downtown Chicago and provide new DTV service to over 8,000,000 people.² With the proposed allotment of DTV Channel 36, WJYS alone will be orphaned from that prime transmitting site and precluded from offering DTV service to the entire market.³ Specifically, WJYS will be consigned to compete with 11 other stations who can offer DTV service to the entire Chicago

¹The others are WBBM-TV(NTSC Ch. 2); WCFC-TV(NTSC Ch. 38); WCIU-TV(NTSC Ch. 26); WEHS-TV, Aurora, Illinois (NTSC Ch. 60); WFLD(TV)(NTSC Ch. 32); WGBO-TV, Joliet, Illinois (NTSC Ch. 66); WGN-TV(NTSC Ch. 9); WLS-TV(NTSC Ch. 7); WMAQ-TV(NTSC Ch. 5); WPWR-TV, Gary, Indiana (NTSC Ch. 50); and WSNS-TV(NTSC Ch. 44). Television and Cable Factbook, 1997 Edition, p. A-371. WWTO-TV, licensed to LaSalle, Illinois (over 50 miles from Chicago), but also included in the market, is a non-profit affiliate of Trinity Broadcasting Network.

²See Engineering Statement of Kevin T. Fisher, attached as Exhibit 1 (“Fisher Statement”), and Sixth Order at Appendix B, pp. B-18 and B-19.

³See Fisher Statement and Sixth Order at Appendix B, p. B-19.

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market and a consumer base that is more than 1,000,000 people larger than that which WJYS can offer.⁴ It is one thing to be able to struggle to compete against such odds with a single channel in a television industry that has long held widespread consumer acceptance. It is a very different thing — an impossibility — to survive in developing, marketing, and selling new multichannel businesses when facing such a gigantic service disadvantage, the inability to reach the entire market, and 11 competitors who can. The allotment of Channel 36 to WJYS is not a handicap; it is a death knell. It is the antithesis of “ensuring that all stations are able to provide service competitively within their respective markets,” the very goal that the Sixth Order sought to achieve.

This tilted, insurmountably uphill field on which the Sixth Report has placed WJYS is especially intolerable where, as here, Jovon is a small business and the Commission’s obligation is “to minimize the significant economic impact on small entities” of its action. Jovon is also a minority-owned small business, and as the Commission stated, “our spectrum management responsibilities to ensure that the DTV spectrum is used efficiently” warrant the fostering of fair and competitive participation “particularly by minorities and women.” Choking WJYS off from a fair and competitive place in the new DTV industry through allotment of a less-than-full-market DTV channel hardly fulfills the Commission’s intentions for such a small business. Furthermore, the allotment of DTV Channel 36 to WJYS will cause the displacement of authorized low power TV station W36AO,⁵ an undesirable impact which Commission policy wants minimized as much as possible.

Accordingly, the Sixth Report has unintentionally created an aberration with WJYS, a DTV allotment that precludes rather than ensures the station’s ability to provide DTV service competitively

⁴Sixth Order at Appendix B, pp. B-18 and B-19.

⁵Fisher Statement at p. 2.

within its market, that abandons and defeats the goals of enabling participation by small businesses and minorities, and that exacerbates instead of minimizes the impact on authorized low power services. However, as first noted above, a simple cure for these deficiencies is at hand.

II. DTV Channel 64 Should Be Allotted to Jovon

As set forth in the Fisher Statement attached, a simple remedy is available that will reverse all of the untoward consequences of Jovon's current allotment. By allotting DTV Channel 64 to WJYS instead of Channel 36, WJYS will be able to join and compete equitably with its competitors from the Sears/Hancock antenna farm, the authorized activities of low power TV station W36AO will be undisturbed, and no other facility will be adversely affected.

Moreover, the allotment of Channel 64 to WJYS will accomplish other public interest benefits which support that action. See, e.g., In re Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (the Commission must give reasoned consideration to each of the pertinent public interest factors); ITT World Communications, Inc. v. FCC, 725 F. 732, 746-47, 754-55 (D.C. Cir. 1984) (same). The Commission has long recognized the many public interest benefits that flow from centralizing all competing stations at a common transmission location. For example, in WTCN Television, Inc., 14 FCC 2d 870, 890 (Rev. Bd., 1968), review denied, FCC 69-140 (Feb. 12, 1969), recon. denied, 17 FCC 2d 909 (1969), the Commission said:

“Moreover, there are additional concomitant public interest benefits which would result from the establishment of a single common antenna farm area accommodating all of the television stations or channels in this area. First, it permits improvements not only in coverage..., but also in signal quality by amelioration of such technical problems as antenna orientation. Secondly, it conduces to competitive equality among the various area stations...[and] would result in substantial public interest benefits both in terms of air safety and of quantity and quality of broadcast service.”

Similarly, in WSET-TV, 80 FCC 2d 233, 245-46 (1980), in deciding to grant an application to relocate and make changes to a television station, the Commission stated --

“On balance, we find here that a grant of WSET’s application is in the public interest.... There will also be an improvement in the receiving antenna orientation problem in Lynchburg.... In WSET’s engineering statement of November 11, 1977, it indicated that the ‘...geography of the ... situation is such that residents of the Lynchburg area need either separate receiving antennas or a rotatable antenna in order to obtain proper reception for all three stations.... The proposed site is so located that a single antenna of fixed orientation could be used for reception of all three stations in the Lynchburg area.’”

See also Indiana Broadcasting Corp., 25 FCC 2d 421, 424 (1970) (“Indiana’s intention to establish an informal antenna farm may prove to be a benefit to air navigation and safety and the Commission has recognized that simplification of receiving antenna orientation can be a public interest factor”).

Of particular pertinence here, the Commission has stressed the importance of centralizing transmitter locations to achieve the public interest benefit of creating a fair and equal opportunity for competition. For example, in Elba Development Corp., 96 FCC 2d 376, 382 (1984), while distinguishing a contrary case the Commission observed:

“in that case the ALJ permitted the requested relocation so as to allow all Tulsa, Oklahoma television stations to locate at the same transmission site (i.e., an “antenna farm”), and to thereby prevent a serious competitive imbalance amongst those Tulsa stations. The Commission has historically recognized the furtherance of such competitive balance in similar situations as an independent public interest factor in support of relocation requests.” (Citations omitted.)

Likewise, in Fisher Broadcasting Co. (KATU), 25 RR 746, 749 (1963), the Commission granted an application to relocate a station’s facilities and held:

“Since applicant’s proposed transmitter site is already utilized by its competitors it appears that these predicted gains within Portland and the Portland urbanized areas should eliminate the existing imbalance, which so disfavors station KATU. In this connection, the applicant also points out that, at present approximately 358,068 persons in Portland itself reside in locations where their receiving antennas are

presumably oriented more than 90 degrees from Station KATU's present site. This problem would also be solved by a grant of the present application."

Here, too, the allotment of DTV Channel 64 will eliminate the colossal competitive imbalance that so disfavors WJYS, and will solve the serious antenna orientation problem that results from WJYS' status as the only commercial station in the market that is forced to locate miles outside the market's centralized antenna zone.

The allotment of DTV Channel 64 to WJYS would not be inconsistent with the Sixth Order's regulatory scheme. While the Table of Allotments primarily utilized Channels 2 to 51 for DTV, the Commission allotted numerous stations DTV channels outside this "core spectrum," particularly in congested areas. Thus, in the New York ADI, WNET(TV) (NTSC Ch. 13) was allotted DTV Channel 61.⁶ In the Los Angeles ADI, KCBS-TV (NTSC Ch. 2) was allotted DTV Channel 60, KTLA(TV) (NTSC Ch. 5) was allotted DTV Channel 68, KTTV(TV) (NTSC Ch. 11) was allotted DTV Channel 65, and KCOP(TV) (NTSC Ch. 13) was allotted DTV Channel 66.⁷ Indeed, there are some 68 instances where both the original NTSC channel and the assigned DTV channel are outside the core. These stations will eventually be given new DTV assignments within the core from recovered spectrum.⁸ Thus, the utilization of another channel outside the core spectrum, at least during the transition period, will not contravene or impede the Commission's allotment scheme for

⁶Sixth Order at Appendix B, p. B-30.

⁷Id. at B-10.

⁸Id. at ¶84.

DTV. Nor will it materially impact fulfillment of the Commission's general goal to facilitate the early recovery of Channels 60 to 69 and the eventual recovery of analog spectrum.⁹

In short, the allotment of DTV Channel 64 will (1) ensure that WJYS will be able to provide DTV service competitively in its market while maintaining a high degree of service to the station's service area, (2) save that basic opportunity for a small business enterprise, (3) fulfill the Commission's spectrum management responsibility to ensure that the DTV spectrum is used efficiently through fostering of diversified ownership, (4) avoid displacement of an authorized low power TV facility, (5) complete the centralization of all Chicago market commercial stations at the downtown antenna farm, (6) solve a serious antenna orientation problem, and (7) thereby overwhelmingly serve the public interest. This is a solution that cries out for adoption.

III. Maintaining Jovon's Current Allotment Would Undermine the Propriety of the Sixth Order

Should Jovon's allotment not be changed and WJYS be compelled to compete futilely against 11 stations with vastly superior DTV facilities, the fundamental propriety of the Sixth Order will require reconsideration. At least three defects that will require reconsideration and revision of the scheme adopted are readily apparent.

First, it will be necessary for the Commission to reconsider and correct the inadequate Final Regulatory Flexibility Analysis ("FRFA") regarding the Sixth Order's minimization of "significant economic impact on small entities." The FRFA in this matter does nothing more than reiterate the Sixth Order's general assertions that the scheme adopted has an "insubstantial" impact on interference

⁹Id. at ¶76.

and service replication.¹⁰ This conclusory assertion, which neither identifies the small businesses subject to the regulations and their markets, nor analyzes the regulations' impact on the ability of those businesses to compete in the DTV marketplace, is far too superficial to satisfy the requirement for a reasoned statement why the action taken was the best alternative to minimize economic impact on small entities.¹¹ If WJYS' proposed solution is not adopted, the requisite reconsideration of the FRFA must necessarily consider the Sixth Report's severely anticompetitive impact on WJYS as described above.

Second, it will be necessary for the Commission to reconsider the faulty assumption contained in Appendix A to the Sixth Report (Front-to-back ratio (dB)) that all receiving antennas will be oriented in the same direction. As shown above, that assumption is not valid for WJYS and is an insufficiently supported basis for adoption of a major regulatory plan to govern an entire new industry.

Third, as the Sixth Order reports, the Commission's staff has developed and utilized a sophisticated allotment software. Sixth Order at ¶197. Jovon understands that, commendably, the OET staff has made this software available to engineering firms on an informal basis. However, the Commission does not appear to have released a formal public notice concerning the availability of this software to all commenters. Moreover, most firms appear to lack the resources necessary to run and thus analyze the allotment software. Thus, it appears that a significant component in the Commission's methodology was not fully and effectively disclosed to all affected parties and subject to public comment. See Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir.

¹⁰Sixth Order at Appendix D, pp. D-11 and D-12.

¹¹5 U.S.C. § 604(a)(5).

1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that [to a] critical degree, is known only to the agency"); U.S. v. Nova Scotia Food Produces Corp., 568 F.2d 240 (2nd Cir. 1977) (failure to notify interested persons of the scientific research relied upon by the agency prevented relevant comment). But for the ready availability of a solution to the competitively inferior DTV allotment to WJYS, this defect would also require correction on reconsideration.

IV. Conclusion

The public interest requires that Jovon be given a fair opportunity to compete in the new DTV industry. For the foregoing reasons, Jovon respectfully requests that the Commission reconsider the allotment of Channel 36 to WJYS as provided in the Sixth Order, and that the Commission instead allot to WJYS DTV Channel 64.

Respectfully submitted,

JOVON BROADCASTING CORPORATION

By: Howard A. Topel
Howard A. Topel

Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

Its Counsel

June 13, 1997

EXHIBIT 1

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of JOVON BROADCASTING CORPORATION, licensee of WJYS(TV), Channel 62, Hammond, Indiana, in support of its Petition for Reconsideration of the FCC's action detailed in its *Sixth Report and Order* in MM Docket No. 87-268, which assigned digital television (DTV) Channel 36 to WJYS.

WJYS operates in the Chicago, Illinois, DMA. All of the following stations in this market presently broadcast from either the top of Sears Tower or the top of John Hancock Center in downtown Chicago: WBBM-TV, WCFC-TV, WCIU-TV, WEHS-TV, WFLD, WGBO-TV, WGN-TV, WLS-TV, WMAQ-TV, WPWR-TV, and WSNS-TV. These stations have been assigned DTV channels which will permit them to continue to operate from this "antenna farm."

WJYS is presently prohibited from operating from the top of either of these buildings due to spacing restrictions to pertinent co- and adjacent-channel facilities. In assigning DTV Channel 36 to WJYS, the Commission continues to prohibit this station from relocating to the Chicago antenna farm, due to calculated interference to WMVT, Milwaukee, Wisconsin, which operates on NTSC Channel 36. This creates an unfair disparity between WJYS and the other Chicago market stations, due to the fact that viewers' receiving antennas are oriented toward the antenna farm and away from the WJYS transmitter site, which is a substantial distance south of downtown Chicago.

Further compounding this problem are the FCC's planning factors used to derive the DTV Table of Allotments and the corresponding DTV power levels, which assume that viewers have receiving antennas with high front-to-back ratios that are pointed toward the DTV facility. In

the case of WJYS' operating its DTV station from its present NTSC site, such an assumption is not valid.

In addition, Trinity Broadcasting Network is in the process of constructing a low-power television station, W36AO, atop Sears Tower. Under the FCC's proposed allocation of DTV Channel 36 to WJYS, W36AO would be forced off the air.

According to the MSTV/NAB computer study, "Alternative DTV Channel Assignments in the Continental United States," dated May 28, 1997, Channel 64 is available as an alternative DTV channel for use on Sears Tower or John Hancock Center. Attached is the pertinent data from that study. From either location, and even with a minimum ERP of 50 kw, Jovan could effectively and competitively serve the Chicago market, as well as place the requisite City Grade signal over the city of Hammond. We have also determined that the use of this channel on either building will not displace any low-power television station or TV translator, including W36AO.

It should be noted that while we conducted an interference study of DTV Channel 64 for WJYS based on currently available data, the complex software used by the FCC to replicate existing station coverage with the corresponding DTV facility, as well as to calculate interference between and among DTV and NTSC stations, is not readily accessible to the public at present. As a result, further study of other alternative channels for WJYS may be considered, when that information becomes available.

In the meantime, it is requested that the Commission assign DTV Channel 64 rather than Channel 36 to WJYS. Jovan understands and agrees that once the DTV transition period ends, its operation may be changed to a DTV channel within the core spectrum (Channels 2-46

or Channels 7-51), upon the identification of such a channel after other stations in the market have returned their non-DTV channels.

This proposal promotes an efficient implementation of digital television service, as well as the FCC's effort to minimize the impact of DTV on the low-power television industry. Thus, the substitution of DTV Channel 64 for DTV Channel 36 for WJYS clearly serves the public interest.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



KEVIN T. FISHER

June 10, 1997

5 6 7 8 29 31 45 46 54 56 57 58 59 60 61 62 63 64 65 66 67 68 69

Station at: IL CHICAGO
64 68 69

Existing channel 2 ATV channel 3

Station at: IL CHICAGO
64 68 69

Existing channel 5 ATV channel 29

Station at: IL CHICAGO
64 68 69

Existing channel 7 ATV channel 52

Station at: IL CHICAGO
64 68 69

Existing channel 9 ATV channel 19

Station at: IL CHICAGO
64 68 69

Existing channel 11 ATV channel 47

Station at: IL CHICAGO
64 68 69

Existing channel 20 ATV channel 21

Station at: IL CHICAGO
64 68 69

Existing channel 26 ATV channel 27

Station at: IL CHICAGO
64 68 69

Existing channel 32 ATV channel 31

Station at: IL CHICAGO
64 68 69

Existing channel 38 ATV channel 43

Station at: IL CHICAGO
64 68 69

Existing channel 44 ATV channel 45

Station at: IL DECATUR
5 6 7 8 9 29 58 60 61 62 63

Existing channel 17 ATV channel 18
64 65 66 68 69

Station at: IL DECATUR
5 6 7 8 9 29 58 60 61 62 63

Existing channel 23 ATV channel 22
64 65 66 68 69

Station at: IL EAST ST. LOUIS
7 16 18 19 28 33 41 45 48 49 50
68 69

Existing channel 46 ATV channel 47
51 52 53 54 58 59 60 61 62 63 64 65 66 67

Station at: IL FREEPORT
63 64 65 67 69

Existing channel 23 ATV channel 41

CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that copies of the foregoing "Petition of Jovon Broadcasting Corporation for Reconsideration" were served this 13th day of June 1997, via hand delivery upon the following:

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W.--Room 814
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.--Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.--Room 832
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.--Room 802
Washington, D.C. 20554

William E. Kennard, General Counsel
Federal Communications Commission
1919 M Street, N.W.--Room 614
Washington, D.C. 20554

Mr. Bruce Franca
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W.--Room 480
Washington, D.C. 20554

Mr. Alan Stillwell
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W.--Room 480
Washington, D.C. 20554

Mr. Robert Eckert
Office of Engineering and Technology
Technical Research Branch
Federal Communications Commission
2000 M Street, N.W.--Room 230
Washington, D.C. 20554

Roy J. Stewart, Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 314
Washington, D.C. 20554

Clay Pendarvis, Chief
Television Branch, Video Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 702
Washington, D.C. 20554

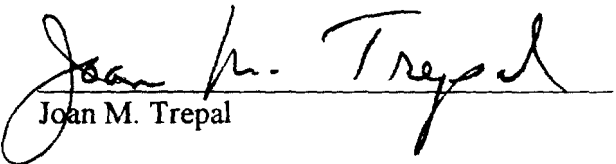
Mr. David Bennett
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 700
Washington, D.C. 20554

Mr. Saul Shapiro
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 302-E
Washington, D.C. 20554

Ms. Gretchen Rubin
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 544
Washington, D.C. 20554

Ms. Mania Baghdadi
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 552
Washington, D.C. 20554

Mr. Dan Bring
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.--Room 534-A
Washington, D.C. 20554


Joan M. Trepal